The Negotiable Instruments Law in Ohio

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One who has occasion to make any considerable study of the law of negotiable instruments in Ohio is struck with one fact. There are many problems which have resulted in much litigation and accumulation of authorities in other states and upon which there is little or no case authority in Ohio. The Uniform Negotiable Instruments Law has been adopted in every state as well as in the District of Columbia and the territorial possessions.[1] Ohio was among the states which adopted the law soon after its approval by the body now known as the National Conference of Commissioners on Uniform State Laws.[2] The dearth of reported cases construing the statute is not to be explained by the fact that it is new and untried. New York adopted the law in 1897 only five years earlier than Ohio, yet the former has approximately ten times as much case law concerning it as has the latter.[3]

After puzzling over the question of why a great commercial state such as Ohio should have so small a body of case law on controversial points of the N.I.L. the writer has reached a tentative conclusion.[4] It is probable that the cognovit or judg-

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[1] BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 1194.

[2] The Negotiable Instruments Law was drafted by a Committee of the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States appointed in 1895. The draft was approved by the Conference in 1896 and adopted in Connecticut, Colorado, New York and Florida in 1897. It was adopted in Ohio in 1902, 95 O.L. 169 and became effective Jan. 1, 1903. See Brannan *op. cit. supra*, note 1, at p. 1194.

[3] This is a rough approximation from the fact that Brannan's, N.I.L. (6th ed. Beutel 1938) lists 740 cases from New York and 72 from Ohio. There are duplications in the table of cases and hence the total number of cases is less than the number just indicated for each state.

[4] If any former student or reader can suggest anything which would shed light either as confirming or casting doubt upon this tentative conclusion, it will be appreciated.

ment note is more widely used in this state than in most others. Statistics to support this belief are not available. It is true, however, that in many states the warrant of attorney to confess judgment is void and the cognovit note is not used at all.[5] It is probable that such notes are used more frequently in some parts of Ohio than in others. An examination of 1500 cases in the Franklin County Common Pleas Court reveals that practically all negotiable instrument cases involve either cognovit notes upon which judgment is taken by confession or notes secured by real estate mortgage foreclosure of which is sought in the same action with that on the note. It is not customary for the latter notes to contain a warrant of attorney to confess judgment. The character of transaction out of which such notes arise probably precludes many of the problems which have been the subject of great controversy.[6] Eliminating the cases involving foreclosure of real property mortgages the great bulk of negotiable instrument litigation seems to involve cognovit notes. While it is possible for a defendant to have a cognovit

[5] Note. *Validity of Warrant of Warrant of Attorney to Confess Judgment* (1938) 16 Tex. L. Rev. 585. Indiana has probably gone further than any other state in attempting to discourage the use of cognovit notes. The legislature of that state in 1927 enacted two laws (Ch. 66, Acts of 1927) "An Act entitled an act concerning contracts to pay money, making unlawful all contracts and stipulations for the confession of judgments under powers of attorney given before a cause of action to enforce judgment of money due therein shall be accrued, or for the release of errors, or for giving consent to the issue of execution under any powers of attorney so given." (Burns Ind. Stat. Ann. 2-2904 & 5).

Ch. 227 Acts of 1927, an Act entitled an act defining a cognovit note, prohibiting their execution and procurement and fixing a penalty for violation thereof. (Burns Ind. Stat. Ann. 2-2906). See Farabaugh and Arnold, *Commentaries on the Public Acts of Indiana*, 1927 III. *The Cognovit Note Act* (1929) 5 Ind. L.J. 93 and Gavit, *The Indiana Cognovit Note Statute* (1929) 5 Ind. L.J. 208. Ogden, *Negotiability of Judgment Notes* (1928) 3 Ind. L.J. 695.

[6] Among other factors might be mentioned the following: (1) the loan is usually for a long period, (2) the payee is generally a financial institution whose business is that of lending money on such security rather than that of discounting negotiable paper as a somewhat speculative business, (3) standardized forms which have been carefully drawn to eliminate troublesome problems of construction are used.

judgment vacated it seems to be infrequently done.[7] Matters which are pleaded by way of answer or demurrer in other jurisdictions, and which must be disposed of before judgment is rendered, are unnoticed in the great mass of cases where cognovit judgments are taken and remain unquestioned.

For the purpose of substantiating the thesis that many important negotiable instrument questions are as yet undecided in Ohio it is proposed to discuss some of them in this article. This is done with the further purpose of suggesting to Ohio lawyers some of the leading authorities pro and con bearing upon such questions.[8]

Chattel Notes

It is quite common for notes, cognovit and otherwise, given as part or all the purchase price of a machine or piece of equipment to recite that fact and that title thereto is to remain with the seller until the note is paid. N.I.L. Section 3[9] provides: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with; . . . (2) A statement of the transaction which gives rise to the instrument." In view of this it is not surprising that most of the cases which have involved the question of negotiability of a title retaining note have held affirmatively.[10] Seemingly the only reported cases

[7] An article to be published in the Journal in the near future will deal with the various phases of the law of cognovit judgments. It is hoped that data to support the statement in the text will be available for use in that article.

[8] Still another purpose is that of eliciting from readers any helpful suggestions or criticisms as mentioned at the end of this article.

[9] Ohio G.C. sec. 8108.

[10] Brannan's, N.I.L. (6th Ed. Beutel 1938) p. 155, 181.

Ann. *Negotiability of title retaining notes*, 28 A.L.R. 699; 44 A.L.R. 1397.

Ann. *Note for purchase price as conditional sale*, 17 A.L.R. 1481; 92 A.L.R. 335.

7 Am. Jur. "Bills and Notes" sec. 191 *et seq.* p. 900.

10 C.J.S. "Bills and Notes" sec. 92, p. 540.

Bigelow, Bills, Notes & Checks (3rd ed. Lile 1928) sec. 98, p. 61.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 56, p. 62.

Ogden, Negotiable Instruments (4th ed. 1938) sec. 64, p. 115.

Aigler, *Conditions in Bills and Notes* (1928) 26 Mich. L. Rev. 471.

in Ohio are two circuit cases decided long before the adoption of the statute and therefore of little aid on the question of its construction.[11]

Acceleration Clauses

N.I.L. Section 2[12] provides: "The sum payable is a sum certain within the meaning of this act, although it is to be paid, . . . (3) By stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; . . ." There is no provision expressly covering the rather common form of note which recites that it is secured by collateral, and that if the collateral depreciates in value more will be furnished or the note will become immediately due or will do so at the option of the holder. The better view would seem to be that such a clause does not impair negotiability.[13] However, there is a substantial body of opinion to the opposite effect.[14]

Richter, *Are Chattel Notes Negotiable* (1930) 5 Notre Dame Lawy. 172.

Titche, *Is Negotiability Impaired by a Retention of Title* (1933) 7 Tulane L. Rev. 607.

Notes. (1922) 11 Cal. L. Rev. 37; (1927) 100 Cent. L. Jour. 136; (1932) 31 Mich. L. Rev. 272; (1927) 25 Mich. L. Rev. 668; (1923) 71 U. Pa. L. Rev. 167.

[11] 29 O. Jur. "Negotiable Instruments" sec. 87, after stating that there is a diversity of opinion, says, "The question is not settled in Ohio," and cites only *Mansfield Sav. Bk.* v. *Miller*, 2 Ohio C.C. 96, 1 Ohio C.D. 383 (1887 Aff. W.O. 53 Ohio St. 666; 44 N.E. 1142 (1895) and *Mansfield Sav. Bk.* v. *Flowers*, 9 Ohio Dec. Rep. 169, 11 Ohio L. Bull. 141 (1881). Both cases held the notes to be negotiable.

[12] Ohio G.C. sec. 8107.

[13] Brannan's, N.I.L. (6th ed. Beutel 1938) p. 170, 180.

Ann. *Acceleration provisions as affecting negotiability*, 34 A.L.R. 872; 72 A.L.R. 268.

Ann. *Effect on note of acceleration of mortgage securing note*, 34 A.L.R. 848; 56 A.L.R. 185.

Ann. *Validity of provision accelerating maturity of obligations as affected by rule against contracts in restraint of trade*, 96 A.L.R. 1130.

Ann. *Duty of creditor to apply funds so as to prevent operation of acceleration clause*, 80 A.L.R. 246.

8 Am. Jur. "Bills and Notes" sec. 158 *et seq.* p. 878.

10 C.J.S. "Bills and Notes" sec. 98 *et seq.* p. 548.

Bigelow, Bills, Notes & Checks (3rd ed. Lile 1928) sec. 143, p. 90.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 54, p. 56.

Consent to Extension of Time

It is not uncommon for instruments otherwise negotiable to contain a clause permitting the extension of time of payment without loss of rights against the parties. N.I.L. Section 5[15] provides: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: . . . (3) Waives the benefit of any law intended for the advantage or protection of the obliger; . . . " The purpose of a clause permitting extension of time is to waive the benefit of the rule of suretyship law which is codified in N.I.L. Section 120[16] "A party secondarily liable on the instrument is discharged . . . (6) By any agreement binding upon the holder to extent the time of payment, or to postpone the holder's right to enforce the instru-

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Ogden, Negotiable Instruments (4th ed. 1938) sec. 54, p. 77.

Aigler, *Time Certainty in Negotiable Paper* (1929) 77 U. Pa. L. Rev. 313.

Chafee, *Acceleration Provisions in Time Paper* (1919) 32 Harv. L. Rev. 747.

Gilligan, *Acceleration Clauses in Notes and Mortgages* (1939) 88 U. Pa. L. Rev. 94.

Turner, *A Factual Analysis of Certain Proposed Amendments to the N.I.L.* (1929) 38 Yale L. J. 1047.

Waddell, *Acceleration Clauses and Negotiability* (1925) 11 Va. L. Rev. 129.

Notes. (1932) 20 Cal. L. Rev. 329; (1931) 19 Cal. L. Rev. 525; (1919) 7 Cal. L. Rev. 263; (1937) 37 Col. L. Rev. 430; (1933) 8 Ind. L. Jour. 550; (1927) 13 Iowa L. Rev. 98; (1929) 15 Iowa L. Rev. 94; (1933) 31 Mich. L. Rev. 983; (1932) 31 Mich. L. Rev. 272; (1932) 30 Mich. L. Rev. 789; (1931) 29 Mich. L. Rev. 924; (1924) 22 Mich. L. Rev. 710; (1932) 16 Minn. L. Rev. 302; (1932) 16 Minn. L. Rev. 308; (1933) 11 Tenn. L. Rev. 282; (1933) 7 U. Cin. L. Rev. 334; (1939) 17 Tex. L. Rev. 199; (1938) 24 Va. L. Rev. 921.

29 O. Jur. "Negotiable Instruments" sec. 81 discusses the problem and cites only *Ashland B. & L. Co.* v. *Kerman*, 23 Ohio App. 127, 155 N.E. 245; 4 Ohio L. Abs. 646 (1926) motion to certify record overruled in 25 Ohio L. Rep. 96, holding acceleration clause in note does not prevent it from being negotiable.

[14] See authorities cited in note 13, *supra*.

[15] Ohio G.C. sec. 8110.

[16] Ohio G.C. sec. 8225.

ment, unless made with the consent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." The great majority of cases have upheld the negotiability of instruments containing such provisions.[17] However, there is a minority view.[18]

Burden of Proof of Consideration

N.I.L. Section 24[19] provides that "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value" and Section 28[20] "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* which the failure is an ascertained and liquidated amount or otherwise." It seems rather obvious that want of consideration and failure of consideration are put in the same category and that burden of proof of either would rest upon the defendant alleging it. This is the view taken by most of the cases which have given any attention to the above sections.[21] *Ginn* v. *Dolan*[22] is frequently cited

[17] Brannan's, N.I.L. (6th ed. Beutel 1938) p. 185.

Ann. *Negotiability As Affected by Provisions for Extension of Time*, 77 A.L.R. 1085.

7 Am. Jur. "Bills and Notes" sec. 151 *et seq.*, p. 874.

10 C.J.S. "Bills and Notes" sec. 99 *et seq.*, p. 554.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 57, p. 64.

Notes: (1935) 15 Bost. U.L. Rev. 297; (1918) 3 Corn. L.Q. 125; (1928) 3 Ind. L.J. 397; (1926) 1 Ind. L.J. 206; (1918) 4 Iowa L. Bull. 123; (1929) 14 Iowa L. Rev. 458, 477; (1928) 26 Mich. L. Rev. 568; (1923) 21 Mich. L. Rev. 927; (1935) 9 Tul. L. Rev. 461; (1929) 77 U. Pa. L. Rev. 1021.

29 O. Jur. "Negotiable Instruments" sec. 82 discusses the problem but cites no Ohio cases.

[18] See authorities cited in note 17, *supra*.

[19] Ohio G.C. sec. 8129.

[20] Ohio G.C. sec. 8133.

[21] Brannan's, N.I.L. (6th ed. Beutel 1938) p. 363.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 180, p. 220.

Ann. *Burden of Proof As to Lack or Failure of Consideration When Plain-*

for the opposite view and it is true that the Ohio Supreme Court in that case distinguished between want and failure of consideration and held that the burden of proof, where want of consideration was alleged, rested upon the plaintiff. Several inferior court cases in recent years have taken the same view citing *Ginn* v. *Dolan.*[23] However, it has been pointed out in a well reasoned common pleas court case[24] that the note involved in *Ginn* v. *Dolan* was executed prior to the effective date of the N.I.L. and Section 195[25] "The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof." This probably accounts for the absence of any reference to the pertinent provisions of the N.I.L. in the opinion in *Ginn* v. *Dolan.* It seems quite probable that when occasion arises the court will fall in line with the majority view that the burden of proof rests upon the defendant.

Bank Credit as Value

In England and in Canada where the holder of an instrument deposits it with his bank and is credited with the amount the bank thereby becomes a holder for value.[26] The prevailing

tiff Not Protected As Holder in Due Course, 35 A.L.R. 1370; 65 A.L.R. 904.

8 Am. Jur. "Bills and Notes" sec. 1005 *et seq.*, p. 594.

11 C.J.S. "Bills and Notes" sec. 655b, p. 75.

Danforth, *Burden of Proof of an Issue of Want of Consideration under the N.I.L.* (1923) 96 Cent. L.J. 350.

Kent, *Want of Consideration and Value in Negotiable Instruments* (1926) 3 Wis. L. Rev. 32.

Notes. (1925) 25 Col. L. Rev. 98; (1937) 26 Ill. B.J. 71; (1931) 16 Iowa L. Rev. 553; (1925) 29 Law Notes (N.Y.) 83; (1940) 38 Mich. L. Rev. 399; (1939) 37 Mich. L. Rev. 950; (1925) 23 Mich. L. Rev. 793; (1925) 9 Minn. L. Rev. 280; (1926) 35 Yale L.J. 369.

[22] 81 Ohio St. 121, 90 N.E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204 (1909).

[23] 29 O. Jur. "Negotiable Instruments" sec. 608. Three recent court of appeals cases cited in the supplement are: *Sharick* v. *Szefcyk,* 17 Ohio L. Abs. 332 (1934); *Schardt* v. *Schardt,* 17 Ohio L. Abs. 185 (1934), and *St. John* v. *St. John,* 23 Ohio L. Abs. 290 (1937). Motion to certify overruled March 17, 1937.

[24] *Miller Rubber Prod. Co.* v. *Noll,* 30 Ohio N.P. (N.S.) 305 (1933).

[25] Ohio G.C. sec. 8299.

[26] *Royal Bank* v. *Tottenham* (1894) 2 Q.B. 715; *Capital & Counties Bank* v. *Gordon* (1903) A.C. 240; *Ex parte Richdale* (1882) 19 Ch. D. 409; *Bank of British N.A.* v. *Warren* (1909) 19 Ont. L. Rep. 257; 6 A.L.R. 253.

rule in this country is to the contrary.[27] It is generally held that the bank must have actually honored withdrawals by the depositor which tapped that particular deposit before it can be regarded as a holder for value.[28] The question would ordinarily arise where there is a personal defense to an action on the deposited instrument and the bank is claiming immunity from such defense by reason of being a holder in due course. Of course if the depositor or some prior holder were a holder in due course, N.I.L. Section 58[29] would give adequate protection to the bank. It provides ". . . But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Where some previous holder gave value

[27] Ann. *Crediting the Proceeds of Negotiable Paper to Holder's Deposit Account as Constituting Bank as Holder in Due Course,* 6 A.L.R. 252; 24 A.L.R. 901; 60 A.L.R. 247 and 80 A.L.R. 1064.

BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 375 states that this is the majority rule but on p. 376 criticizes the rules and cites a number of recent cases which "have reached the proper result that mere crediting the account is value."

Ann. *Crediting Amount to Depositor's Account as Precluding Recovery Back of Money Paid to Bank by Mistake,* 25 A.L.R. 129.

29 O. Jur. "Negotiable Instruments" sec. 187, p. 960.

8 Am. Jur. "Bills and Notes" sec. 442, p. 191.

10 C.J.S. "Bills and Notes" sec. 316 b, p. 803.

BIGELOW, BILLS, NOTES & CHECKS (3rd ed. Lile) sec. 477, p. 367.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 899, p. 951.

Baker, *Bank Deposits & Collections* (1912) 11 Mich. L. Rev. 122.

Frye, *Crediting an Account as Value* (1924) 2 Wis. L. Rev. 408.

Moore, Susman & Corstvet, *Drawing against Uncollected Checks* (1935) 45 Yale L.J. 260.

Townsend, *Bank Deposits of Commercial Paper* (1929) 7 N.Y.U.L.R. 292, 618.

Turner, *Deposits of Demand Paper As Purchases* (1928) 37 Yale L.J. 874.

Comment, *Value in the Transfer of Negotiable Instruments* (1924) 33 Yale L.J. 628.

Notes: (1920) 20 Col. L. Rev. 351; (1928) 27 Mich. L. Rev. 100; (1919) 17 Mich. L. Rev. 703; (1923) 7 Minn. L. Rev. 583; (1929) 6 N.Y.U. L. Rev. 318; (1923) 72 U. Pa. L. Rev. 61; (1921) 69 U. Pa. L. Rev. 378.

[28] See note 27, *supra.*

[29] Ohio G. C. sec. 8163.

but was not a holder in due course it would seem that the bank having the other qualifications set out in N.I.L. Section 52[30] might claim to be a holder in due course by virtue of N.I.L. Section 26[31] "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." For some reason this possibility has escaped the attention of the courts dealing with the bank credit question.[32]

Rule in Clayton's Case

In connection with the question of determining whether a bank has become a holder for value by reason of permitting withdrawals there is frequently difficulty arising from a succession of deposits and withdrawals. Some courts have held that the amount represented by the deposited item has never been withdrawn if the depositor's account has been continuously larger than it was prior to that particular deposit because of subsequent deposits.[33] The more common view, however, is that which applies the rule in Clayton's Case[34] that "first money in is first money out" or that first debits are to be charged against first credits.[35]

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[30] Ohio G.C. sec. 8157.

[31] Ohio G.C. sec. 8131.

[32] See Hunter, *Holders for Value of Negotiable Instruments* (1937) 22 Ill. L. Rev. 287.

[33] *Nat. Bk. of Commerce* v. *Morgan*, 207 Ala. 65, 92 So. 10, 24 A.L.R. 897; *American Surety Co.* v. *Ind. Sav. Bk.*, 242 Mich. 581, 219 N.W. 689, 27 Mich. L. Rev. 100 (1928) and annotations in A.L.R. cited *supra* note 27.

[34] (1816) 1 Mer. 572.

[35] 29 O. Jur. "Negotiable Instruments" sec. 187, p. 961. No Ohio cases cited.

Brannan's, N.I.L. (6th ed. Beutel 1938) p. 383.

Ann. *Crediting the Proceeds of Negotiable Paper to Holder's Deposit Account As Constituting Bank a Holder in Due Course*, 6 A.L.R. 252; 24 A.L.R. 901; 60 A.L.R. 247 and 80 A.L.R. 1064.

8 Am. Jur. "Bills and Notes" sec. 443, p. 194.

10 C.J.S. "Bills and Notes" sec. 316 b, p. 806.

Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 489, 477, p. 368.

Daniel, Negotiable Instruments (7th ed. Lile Calvert 1933) sec. 899, p. 953.

Comment, *First Money in Is First Money Out* (1936) 10 U. Cin. L. Rev. 278.

Notes: (1932) 26 Ill. L. Rev. 579; (1921) 69 U. Pa. L. Rev. 378.

COLLATERAL SECURITY FOR PRE-EXISTING DEBT

N.I.L. Section 25[36] provides "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at future time." Even prior to the statute it was generally held that a negotiable instrument taken as payment of a pre-existing debt was taken for value although there would have been no consideration in such a transaction involving a non-negotiable contract.[37] However, where the instrument was taken merely as collateral security for a pre-existing debt there were two lines of authorities prior to the statute.[38] The so-called federal rule originated with *Swift* v. *Tyson*.[39] The obsequies for the holding that there could be a distinct federal rule were read in the case of *Erie R. Co.* v. *Tompkins*.[40] Under the rule of the latter case the federal courts would have been bound in *Swift* v. *Tyson* to follow the New York rule as found in *Bay* v. *Coddington*.[41] The latter case held that one taking an instrument as collateral

[36] Ohio G.C. sec. 8130.

[37] BIGELOW, BILLS, NOTES AND CHECKS (3rd ed. Lile 1928) sec. 489, p. 383.

BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 391. Indicating some doubt.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 209, p. 262.

[38] BIGELOW, BILLS, NOTES AND CHECKS (3rd ed. Lile 1928) sec. 489, p. 383.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 900, p. 956.

29 O. Jur. "Negotiable Instruments" sec. 195, p. 967.

8 Am. Jur. "Bills and Notes" sec. 440, p. 188.

10 C.J.S. "Bills and Notes" sec. 318, p. 809.

[39] 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).

[40] 304 U.S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817 (1938).

Bowman, *The Unconstitutionality of the Rule of Swift* v. *Tyson* (1938) 18 Bost. U.L. Rev. 659.

McCormick & Hewens, *The Collapse of "General" Law in the Federal Courts* (1938) 33 Ill. L.R. 126.

Shulman, *The Demise of Swift* v. *Tyson* (1938) 47 Yale L.J. 1336.

Notes. (1938) 2 Md. L. Rev. 263; (1938) 26 Mich. L. Rev. 1312; (1938) 22 Minn. L. Rev. 885; (1938) 12 Temp. L. Quart. 486; (1938) 86 U. Pa. L. Rev. 896; (1938) 24 Va. L. Rev. 895.

[41] (1821) 5 Johns, Ch. 54.

security for a pre-existing debt did not qualify as a holder for value and did not take in due course. Prior to the statute many of the state courts followed the New York rule.[42] However, most courts including those of New York have finally concluded that the statute is intended to codify the former federal rule.[43] N.I.L. Section 27[44] makes this seem the more certain. "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Assignment and Guaranty

The holder of an instrument sometimes writes over his signature a statement which departs from the usual forms and therefore raises questions. "I assign the within note," signed by the holder is illustrative. First there is the question: Is it an indorsement so as to permit the assignee to be regarded as a holder in due course? The weight of authority favors an affirmative answer.[45] A court of appeals in Ohio has taken the minority view.[46] A second question sometimes arises, *i.e.* grant-

[42] See note 38, *supra.*

[43] See authorities cited in note 38, *supra.*

Ann. *Taking Negotiable Paper As Collateral Security for Pre-existing Indebtedness As Sustaining One's Character As Holder in Due Course under the Uniform Negotiable Instruments Law*, 80 A.L.R. 670.

Notes. (1922) 22 Col. L.R. 279; (1938) 15 Tenn. L. Rev. 397.

[44] Ohio G.C. sec. 8132.

[45] Brannan's, N.I.L. (6th ed. Beutel 1938) p. 474, p. 479.

8 Am. Jur. "Bills and Notes" sec. 320, p. 55.

10 C.J.S. "Bills and Notes" sec. 208 b, p. 695.

Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 256, p. 184.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 764, p. 793.

29 O. Jur. "Negotiable Instruments" sec. 185, p. 959.

Ann. *Effect of Assignment Indorsed on the Back of Commercial Paper*, 44 A.L.R. 1353.

Arant, *The Written Aspect of Indorsement* (1924) 34 Yale L.J. 144.

Notes: (1931) 19 Cal. L. Rev. 324; (1933) 8 St. John's L. Rev. 129; (1929) 3 U. Cin. L. Rev. 225; (1936) 11 Wis. L. Rev. 406.

[46] *Carius* v. *Ohio Contract Purchase Co.*, 30 Ohio App. 57, 164 N.E. 234 (1928).

Note. (1929) 3 U. Cin. L. Rev. 225.

ing it is an indorsement, is it a qualified indorsement? In view of the definition of a qualified indorsement this question is a natural one. N.I.L. Section 38[47] provides "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument." Perhaps the weight of authority favors the view that the "assignment type of indorsement is unqualified, but there are many cases holding it to be qualified.[48]

Similarly two questions may arise in connection with a guaranty placed on the back of a negotiable instrument. By the better view such a guaranty is an indorsement and the transferee may qualify as a holder in due course if he has the other qualifications.[49] The guarantor is generally deemed to have waived

[47] Ohio G.C. sec. 8143.

[48] BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 495.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 784, p. 813.

8 Am. Jur. "Bills and Notes" sec. 320, p. 55.

10 C.J.S. "Bills and Notes" sec. 214 b. (3) p. 703.

29 O. Jur. "Negotiable Instruments" sec. 161, p. 941, citing *Lenhart* v. *Ramey*, 3 Ohio C.C. 135, 2 Ohio C.D. 77, Aff. W.O. 24 Ohio L. Bull. 428 (1888).

Ann. *Effect of Assignment Indorsed on the Back of Commercial Paper*, 44 A.L.R. 1353.

Arant, *The Written Aspect of Indorsement* (1924) 34 Yale L.J. 144.

Notes. (1938) 8 Detroit L. Rev. 39; (1938) 36 Mich. L. Rev. 483; (1933) 8 St. John's L. Rev. 129; (1938) 12 U. Cin. L. Rev. 101; (1936) 11 Wis. L. Rev. 406.

[49] BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 475 and p. 479.

BIGELOW, BILLS, NOTES AND CHECKS (3rd ed. Lile 1928) sec. 256, p. 184.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 1582, p. 1628.

8 Am. Jur. "Bills and Notes" sec. 320, p. 56.

10 C.J.S. "Bills and Notes" sec. 209, p. 696.

Ann. *Indorsement of Bill or Notes in Form of Guaranty as Transferring Title*, 21 A.L.R. 1375; 33 A.L.R. 97; 46 A.L.R. 1516.

29 O. Jur. "Negotiable Instruments" sec. 184, p. 958, citing no Ohio cases.

Arant, *The Written Aspect of Indorsement* (1924) 34 Yale L.J. 144.

Notes. (1924) 72 U. Pa. L. Rev. 296; (1934) 8 Tul. L. Rev. 602; (1935) 10 Wis. L. Rev. 294.

presentment and notice of dishonor since some effect should be given his words and that effect is consistent with a guaranty.[50]

Payee as a Holder in Due Course

One of the most hotly contested questions arising under the N.I.L. is that as to whether a payee may be a holder in due course.[51] Of course the only situation in which the question can

[50] 29 O. Jur. "Negotiable Instruments" sec. 372, p. 1116.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 1582, p. 1628.

Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 256, p. 185; at sec. 457, p. 352, the author states that if the guarantor is "held to be an indorser he is of course entitled to all of an indorser's rights, including presentment and notice," but he cites no authorities.

[51] Brannan's, N.I.L. (6th ed. Beutel 1938) p. 543.

8 Am. Jur. "Bills and Notes" sec. 374, p. 112.

10 C.J.S. "Bills and Notes" sec. 305, p. 789.

Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 523, p. 416, note 4.

Daniel, Negotiable Instruments (7th ed. Calvert 1933) sec. 884, p. 929.

Ogden, Negotiable Instruments (4th ed. 1938) sec. 158 a, p. 265.

Ann. *Payee as Holder in Due Course under the Negotiable Instruments Law*, 15 A.L.R. 437; 21 A.L.R. 1365; 26 A.L.R. 769; 32 A.L.R. 289; 68 A.L.R. 962; 97 A.L.R. 1215. These annotations take the view that the payee cannot be a holder in due course.

29 O. Jur. "Negotiable Instruments" sec. 180, p. 955, takes the same view but the only Ohio case which has mentioned the problem did not involve in and the statement is *dictum*. In *Burke* v. *Jenkins*, 128 Ohio St. 86 (1934) at p. 94 Judge Allen's opinion quotes from an Iowa case to the effect that a payee may not be a holder in due course.

Aigler, *Payee as Holders in Due Course* (1927) 36 Yale L.J. 608.

Beutel, *Rights of a Remitter* (1928) 12 Minn. L. Rev. 584.

Britton, *Payee as Holder in Due Course* (1934) 1 U. Chi. L. Rev. 728.

Feezer, *May the Payee of a Negotiable Instrument be a Holder in Due Course* (1925) 9 Minn. L. Rev. 101.

Goodwin, *Payees as Holders in Due Course* (1938) 7 Ford. L.Q. 90.

Hamilton, *Holder in Due Course* (1912) 24 Jur. Rev. 41.

Henning, *The Uniform N.I.L. Is it Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. Pa. L. Rev. 471.

Notes. (1922) 10 Cal. L. Rev. 413; (1926) 15 Geo. L.J. 82; (1932) 46 Harv. L. Rev. 151; (1923) 36 Harv. L. Rev. 751; (1917) 30 Harv. L. Rev. 515; (1928) 22 Ill. L. Rev. 765; (1923) 18 Ill. L. Rev. 47; (1932) 30 Mich. L. Rev. 456; (1923) 21 Mich. L. Rev. 591; (1922) 20 Mich. L. Rev. 908; (1922) 6 Minn. L. Rev. 406; (1930) 2 Rocky Mt. L. Rev. 224; (1933) 7 S. Cal. L. Rev. 115; (1934) 8 U. Cin. L. Rev. 547; (1926) 74 U. Pa. L. Rev. 831; (1921) 70 U. Pa. L. Rev. 52; (1935) 21 Va. L. Rev. 707; (1922) 1 Wis. L. Rev. 421; (1927) 36 Yale L.J. 1005.

arise or be of any consequence is one in which an intermediary has dealt with the drawer or maker on the one hand and the payee on the other and has attempted to work a fraud on both. Prior to the statute there was nothing in such a situation to prevent the payee who took for value in good faith, before maturity and without notice a complete and regular instrument payable to his order, from qualifying as a holder in due course. However, it is held in many cases that certain words in sections 14, 16, 30, 52 and 191 preclude the result that a payee may ever be a holder in due course.[52] The better view would seem to be that which harmonizes the result under the statute with that which was reached prior to the statute since there was no announced intention of changing the established rule.[53]

The Doctrine of Price v. Neal

In *Price* v. *Neal*[54] Lord Mansfield held that a drawee who had paid two bills of exchange on which the drawer's signature had been forged could not recover the money from a holder for value to whom the payment had been made. The rule came to be stated as one to the effect that the drawee is bound to know the drawer's signature.[55] However, some courts in this country recognized exceptions to the rule in cases where the holder had been guilty of negligence in failing to disclose the forgery to the drawee before payment.[56] The N.I.L. does not expressly cover the question of the right of the drawee to recover money paid out on a forged draft or check. However, Section 62[57] is generally regarded as codifying the doctrine of *Price* v. *Neal*. "The acceptor by accepting the instrument en-

[52] "Negotiated" in secs. 52 and 14 and as defined in sec. 30, "immediate parties" in sec. 16 and the definitions of "holder" and "issue" in sec. 191.

[53] This is the view taken in practically all the law review articles cited in note 51, *supra*.

[54] 3 Burr. 1354 (1762).

[55] Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 192, p. 127.

[56] Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 195, p. 130.

[57] Ohio G.C. sec. 8167.

gages that he will pay it according to the tenor of his acceptance; and admits

(1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; . . ."

While acceptance and payment are not synonymous and have many distinguishing features this section is cited when a drawee endeavors to recover money mistakenly paid on a forged check or bill.[58] The question has been frequently raised whether Section 62 in codifying the doctrine of *Price* v. *Neal* must be taken as carrying along the equitable exceptions based upon negligence or bad faith or whether the failure to provide for them has terminated them. The more prevalent view seems to be that the exceptions are to be read into Section 62 in those jurisdictions where they were recognized prior to the statute.[59]

[58] BRANNAN'S, *N.I.L.* (6th ed. Beutel 1938) p. 761.

[59] BIGELOW, BILLS, NOTES AND CHECKS (3rd ed. Lile 1928) sec. 196, p. 131.

BRANNAN'S, N.I.L. (6th ed. Beutel 1938) p. 769.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 1613, p. 1656.

8 Am. Jur. "Bills and Notes" sec. 857, p. 499.

10 C.J.S. "Bills and Notes" sec. 467 b, p. 1013.

OGDEN, NEGOTIABLE INSTRUMENTS (4th ed. 1938) sec. 182, p. 321.

29 O. Jur. "Negotiable Instruments" sec. 473, p. 1182.

Ann. *Right of Drawee of Forged Check or Draft to Recover Money Paid Thereon,* 3 A.L.R. 627; 12 A.L.R. 1089; 33 A.L.R. 499; 71 A.L.R. 337.

Ann. *Drawee Bank's Certification of Check as an Admission of Genuineness of Drawer's signature,* 110 A.L.R. 1109.

Aigler, *The Doctrine of Price* v. *Neal* (1926) 24 Mich. L. Rev. 809.

Ames, *The Doctrine of Price* v. *Neal* (1891) 4 Harv. L. Rev. 297.

Cooper, *Forgery, Price* v. *Neal* (1929) 8 Ore. L. Rev. 872.

Woodward, *The Risk of Forgery or Alteration of Negotiable Instruments* (1924) 24 Col. L. Rev. 469.

Notes. (1926) 99 Cent. L. Jour. 2; (1934) 38 Dick. L. Rev. 197; (1917) 31 Harv. L. Rev. 304; (1925) 38 Harv. L. Rev. 680; (1925) 20 Ill. L. Rev. 160; (1932) 26 Ill. L. Rev. 818; (1924) 19 Ill. L. Rev. 277; (1932) 30 Mich. L. Rev. 456; (1928) 27 Mich. L. Rev. 100; (1920) 18 Mich. L. Rev. 790; (1928) 22 Minn. L. Rev. 879; (1930) 14 Minn. L. Rev. 283; (1932) 17 St. L.L. Rev. 273; (1929) 78 U. Pa. L. Rev. 106; (1938) 12 U. Cin. L. Rev. 74; (1922) 70 U. Pa. L. Rev. 125; (1920) 7 Va. L. Rev. 73; (1921) 30 Yale L.J. 296; (1920) 29 Yale L.J. 921.

Certification of Altered Check

In the absence of statute it was usually held that a drawee bank which had certified and paid a check, the amount of which had been fraudulently raised prior to certification, could recover the excess over the original amount as money paid under mistake of fact.[60] Some cases[61] have held this result improper under the N.I.L. in view of the language of Section 62 quoted above, "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance." To reach this result it is necessary to give this sentence the following meaning: "The acceptor by accepting the instrument engages that he will pay it according to its tenor at the time of his acceptance."[62] If no other meaning can be given to the words actually used this may be a justifiable construction. However, a scholarly treatise has pointed out that the words without any addition or change have a definite meaning as used in the section.[63] It is recalled that an acceptance under other sections of the law may be any one of several kinds, general,[64] qualified[65] or for honor.[66] The phrase "according to the tenor of his acceptance" is intended then to indicate that the acceptor is to be liable according to the kind of acceptance which he has chosen to sign. Since N.I.L. Section 132[67] states that "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer," it is suggested that the drawee bank in certifying

[60] Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 197, p. 132.
Brannan's, N.I.L. (6th ed. Beutel 1938) p. 773.
Woodward, Quasi Contracts (1913) sec. 80, p. 126.

[61] *Wells Fargo Bk.* v. *Bk. of Italy*, 214 Cal. 156, 4 P. (2d) 781 (1931); *Nat. City Bk. of Chi.* v. *Nat. Bk.*, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153 (1921).

[62] See *Wells Fargo Bk.* v. *Bk. of Italy*, 214 Cal. 156 (*supra* note 59) at p. 165.

[63] Bigelow, Bills, Notes and Checks (3rd ed. Lile 1928) sec. 197 a, p. 134, note 2.

[64] N.I.L. sec. 139; Ohio G.C. sec. 8244.

[65] *Ibid.*

[66] N.I.L. sec. 161; Ohio G.C. sec. 6266.

[67] Ohio G.C. sec. 8237.

is assenting to the actual order of the drawer. Under this reasoning it would be allowed to recover the amount fraudulently added which it had been induced to pay under a mistake of fact.[68] However, logical this result may be from an accurate analysis of the provisions of the N.I.L. it is submitted that the rule placing the loss upon the certifying bank is preferable from the viewpoint of social policy.[69] In all these situations where one of two innocent parties must suffer, that rule is to be desired which throws the loss where it may be most easily absorbed and where it will have the result of minimizing similar losses in the future. From both angles it is better to place the loss upon the certifying bank. It is more feasible for it to carry insurance to cover such losses and thus cause the shock to be absorbed by a large number of similar institutions each contributing premiums to constitute a fund for the purpose. It is coming to be a relatively simple matter for banks to equip

[68] On the general problem see:

BRANNAN's, N.I.L. (6th ed. Beutel 1938) p. 774.

DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. Calvert 1933) sec. 1866, p. 1912.

8 Am. Jur. "Bills and Notes" sec. 859, p. 503.

10 C.J.S. "Bills and Notes" sec. 183a, p. 676.

MORSE, BANKS AND BANKING (6th ed. 1938) sec. 266, p. 470.

Beasley, *Liability of Drawee Bank where a Check or Bill has been Materially Altered before Payment* (1932) 10 Tenn. L. Rev. 87.

Greeley, *The Effect of Acceptance of an Altered Bill* (1933) 27 Ill. L. Rev. 519.

Steffen and Starr, *A Blueprint for the Certified Check* (1935) 13 N. Car. L. Rev. 450.

Notes. (1931) 19 Cal. L. Rev. 210; (1922) 22 Col. L. Rev. 260; (1922) 35 Harv. L. Rev. 749; (1922) 16 Ill. L. Rev. 615; (1933) 31 Mich. L. Rev. 408; (1931) 29 Mich. L. Rev. 503; (1922) 6 Minn. L. Rev. 405; (1932) 4 Rocky Mt. L.R. 224; (1931) 4 S. Cal. L. Rev. 238; (1931) 79 U. Pa. L. Rev. 492; (1922) 31 Yale L.J. 522.

[69] "Under the Geneva Uniform Law of Bills and Notes (C. 360, M. 151, 1930 II) it is provided by Art. 69 that, 'In case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the terms of the altered text; parties who signed before the alteration are bound according to the terms of the original text.' The same rule is adopted in the Geneva Uniform Cheque Law (C. 294) M. 137, 1931 II B. Art. 51."

STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (1939) p. 446.

their paying teller and certified check cages with ultraviolet light which will facilitate the discovery of the alteration before certification or payment is made. It is reported that banks on the continent are using such lights as regular equipment.

Perhaps enough troublesome problems of the Negotiable Instruments Law have been mentioned to prove the point that the Ohio case law is strangely deficient in this area. The last two problems are not such as would be affected by the use or non use of cognovit notes. As to the others if the anesthetizing effect of the cognovit note is not the explanatory factor the writer would like to have a more satisfactory answer suggested.